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No. 247

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, *Petitioner*

v.

SOUTHEASTERN OIL FLORIDA, INC., and
PACO TANKERS, INC.

On Petition for Writ of Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. B, pp. 31-41) is reported at 119 F. Supp. 731.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTE INVOLVED

The relevant portions of the Merchant Ship Sales Act of 1946 are set forth in the petition (App. A, pp. 27-30), with the exception of Section 2, which is set forth in Appendix A hereto, p. 22.

QUESTION PRESENTED

The four questions framed by petitioner are unnecessarily complex, being addressed to types of legislation and proceedings not here involved.

The only question is whether a Government agency, which has been directed by an Act of Congress to sell Government-owned surplus vessels at a price to be determined in accordance with a fixed formula, may change the formula so as to increase the price; and whether a buyer who has signed, under protest, a purchase contract containing a provision so increasing the price, may recover in the Court of Claims the amount of the increase which he has paid.

STATEMENT

Respondents each purchased a T2-SE-A1 type tank vessel ("T-2") from the U. S. Maritime Commission in 1948 under the Merchant Ship Sales Act of 1946 ("the Act"), which governed the disposition of the Government's war-built merchant fleet after World War II. In general, the Act required the Commission to select a "standard" vessel for each type; to determine a "statutory sales price" for that standard vessel; and then, in selling individual vessels of such type, to make prescribed adjustments in the "statutory sales price" in accordance with a fixed formula (Sections 3(c) and (d)). In making each sale, the Commission was *directed* by the Act to sell at the "statutory sales price" (as so adjusted) (Section 4(a)). In 1946, about two years before the purchases in question, the Commission selected the standard vessel of the T-2 type and determined its unadjusted statutory sales price at $2,026,500 (Pet. 6).

Slotting and Strapping Charges

Respondents' purchase contracts contained (1) a provition for a deduction from the statutory sales price equal to the cost of all "class" repairs, including expressly an installation known as "slotting and strapping"[1] (sometimes called "strengthening," and hereinafter called "strapping") (R. 16-17, 45), and (2) a provision that, since the Commission would make a deduction for the cost of strapping, the vessel should "be considered as having an additional desirable feature within the meaning of clause (3) of Section 3(d) of the Act," for which the buyer was to pay an amount to be determined by the Commission (R. 18, 46). The full text of the contract provision is contained in Appendix B hereto, p. 22.

Respondents protested the insertion of this latter provition (as had previous buyers), claiming that under the Act no charge could be made for strapping (Pet. 8, R. 114, 156, 178, 211). Despite these protests, the Commission insisted upon the provision and, in accordance therewith, respondents made deposits of $28,875 for each of the vessels at the time of their delivery. Three years later, in June, 1951, after demands by respondents for refund of the entire deposits, the Commission determined the charge for strapping to be $16,600, and returned the balance of the deposits (R. 115, 157-60, 179).

Respondents sued below to recover the $16,600 withheld, contending that:

(a) Strapping was not a "desirable feature" in fact, or as a matter of law under Section 3(d)(3) of the Act.

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[1] "Class" repairs were those necessary to place a vessel in legally operable condition (Pet. 5, n. 3). Petitioner admits that the Act required a deduction from the purchase price for all "class" repairs, and that strapping was a "class" requirement when respondents purchased their vessels. (Pet. 5, 7).

(b) The contract clause treating strapping as if it were a "desirable feature" was invalid.[2]

(c) Since strapping was a "class" repair, the Commission was required, under the Act, to absorb its cost and could not avoid this obligation by also treating strapping as a "desirable feature"—the two being mutually exclusive.

In the court below, respondents established an uncontested factual record that strapping was thoroughly undesirable—being a makeshift device installed in 1947 and 1948 on T-2 tankers several years after construction to arrest complete fractures which had occurred in some T-2's because of defective design, steel, and welding (R. 70-80, 115-17, 119-20, 176-78, 180). Strapping consisted of cutting four slots, approximately 200 feet in length, in the midsection of the hull (two on the bottom and two on the deck); and then riveting four steel straps, weighing approximately 18 tons, over the slots. Respondents demonstrated that strapping added to vessel maintenance costs, increased leakage and risk of contamination of cargo, and reduced cargo-carrying capacity (R. 73-74, 116, 119-20, 177-78). They also showed that the 1947 strapping did not remedy the defect, and that further straps, etc., became a class requirement in 1952. These weighed over 100 tons and cost respondents over $100,000 per vessel (R. 117, 180).

Respondents also established that it was the consistent administrative practice of the Maritime Commission to absorb the cost of all class work, including work affecting all vessels of a particular type, with the single exception of

[2] Respondent Paco also contended that under a proper interpretation of its contract, and even if the contract clause treating strapping as a "desirable feature" were valid, no charge whatever was authorized (R. 171-74). Its vessel was purchased at "floor" under the Ship Sales Act, and the adjustments required by the statutory pricing formula under the uncontested lower court decision in *A. H. Bull Steamship Co.* v. *United States*, 123 Ct. Cl. 520, 108 F. Supp. 95, served to eliminate any charge whatsoever.

strapping (R. 87, 261); and that the Commission's own repair division had pointed out that strapping was a class requirement, and in no sense an improvement or betterment (R. 76-77, 245-46).

Respondents also showed that the term "desirable features" had reference to features of commercial utility such as extra cargo handling equipment, refrigeration, additional speed and increased cargo capacity (R. 79, 80).

No effort whatever was made by petitioner in the court below to contravert these facts. It concurred in the material facts (R. 194-95). *And further, petitioner conceded the principal point made by respondents, namely, that strapping was not a "desirable feature," within the meaning of the Act* (R. 215-16, 218, 381-84). The lower court so found (Pet. 34, 119 F. Supp. at 733).

After making this concession,[3] petitioner shifted to a new theory, that the Maritime Commission, at the time strapping became a class requirement in 1947, might have established a new type of T-2 tanker, selected a new standard vessel of that type and increased the statutory sales price to reflect the cost of strapping—not, however, by $16,600 per vessel as determined by the Commission, but as to respondent Southeastern, by $14,730, and as to respondent Paco, by $12,000 (R. 209-11, 219, 229). Petitioner further contended that the Maritime Commission was misled into not retyping the T-2 by respondents' action in executing contracts containing the provision that strapping was to be treated as a desirable feature; and, from such premise, argued that respondents were equitably estopped to deny the validity of the contract provision (R. 213-14).

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[3] On motion for rehearing, petitioner, among other points, claimed that the concession had been erroneously attributed to it (R. 340-1). But petitioner submitted no affidavit or other evidence, to overcome the basis of the concession, which is reviewed in respondents' brief in opposition to motion for rehearing (R. 381-4).

Respondents demonstrated that even if the Commission were misled, which was not established by petitioner, the point was immaterial because it would have been contrary to the Act to establish a new type of T-2 tanker.[4] The court below agreed with respondents, holding that the Act contained a direction by Congress that the cost of placing vessels "in class" (i.e., in condition to operate in accordance with law) was to be deducted from the statutory sales price, and that no part of this cost could lawfully be charged back to respondents under petitioner's new theory, or otherwise (Pet. 36, 119 F. Supp. at 733, 734).

Repair Charges

The purchase contract with respondent Southeastern also contained a provision (R. 18-20) requiring it to pay the cost of certain routine maintenance repairs made to the vessel during a period of six months before Southeastern contracted to purchase the vessel. During that period the Maritime Commission was operating the vessel commercially on a profitable basis and retained the vessel's earnings (R. 95).

Southeastern protested this provision as being contrary to the Act (R. 156), but the Commission insisted upon it, and Southeastern deposited $21,781. The Commission subsequently determined the amount of the charges to be $5,116.79 and returned the balance.

Petitioner cited no provision in the statutory pricing formula in support of the charges. The court below held that they were not authorized, and that the contract provision relating thereto was invalid, stating:

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[4] Respondents pointed out that the strapping requirement was intended simply to remedy a defect in the hull of the vessel, and that it did not change either the type of the vessel or the existing standard vessel (R. 259-66, 316-20). Respondents also showed the absurd results which would follow if a new type of vessel were created each time a defect in the vessel was discovered. It would have meant, for example, that the statutory price would be higher for a defective vessel requiring class repairs, than for a vessel having no defects (R. 269-70).

"... Congress knew that there were hundreds of ships to be sold, some laid up and some operating. It knew that ... there would be great differences in the condition of different ships, with regard to the condition of paint, the cleanness of boilers, the adjustment of compasses, etc. If such matters were to be allowed to affect the sales prices of ships, Congress might just as well have lodged complete discretion in the Commission to set the price of ships. But neither Congress nor the Commission was willing that that should be done. So Congress laid down the formula, and, we think, showed thereby that other items not included in the formula should be disregarded." (Pet. 40, 119 F. Supp. at 735)

ARGUMENT

The petition mistakenly ascribes to this case broad issues of general importance and potential widespread impact. It ignores altogether the special character of Sections 3 and 4 of the Act, which contained a direction by Congress to sell ships to qualified purchasers upon fixed statutory terms. Instead, petitioner proceeds upon the erroneous assumption that Congress left to the Maritime Commission broad discretion in setting prices. At the same time, petitioner overlooks that the declared policy of the statute was to restore the American Merchant Marine, of which respondents are a part, to peacetime commercial status.

To show that the case is not one warranting review by this Court, respondents will deal with four points:

1. Sections 3 and 4 of the Act prescribed a mandatory pricing formula for the sale of the vessels, conferred rights to purchase in accordance with such formula, and precluded the Commission from substituting its judgment for that of Congress as respects price.

2. Because of the mandatory character of the statutory pricing formula, and the buyers' protests, there is no waiver or estoppel.

3. The jurisdiction of the Court of Claims is not open to question under a proper construction of the statutory provisions involved.

4. The decision of the court below, in addition to being correct, concerns only a narrow issue under an expired statute. The decision does not, as petitioner urges, have any broad effect either under that statute, or under other legislation dealing with procurement or disposal of Government property.

1. Mandatory Character of the Act.

The Ship Sales Act was intended to establish a firm pricing basis for the transfer to qualified shipping companies of the Government's war-built merchant fleet, thereby aiding in carrying out the declared policy of the Act (Section 2), which was "to foster the development and encourage the maintenance" of a healthy, seaworthy, vigorous, and privately-owned American Merchant Marine. Experience under the ship disposal legislation enacted after World War I, which contained "no statutory price," had demonstrated the need for a firm pricing formula. (H. Rept. No. 831, 79th Cong., 1st Sess. (1945), p. 2.)

The mandatory character of the legislation is plainly shown by Section 4(a) of the Act:

> "Sec. 4. (a) Any citizen of the United States may make application to the Commission to purchase a war-built vessel, under the jurisdiction and control of the Commission, at the statutory sales price. If the Commission determines that the applicant possesses the ability, experience, financial resources, and other qualifications, necessary to enable him to operate and maintain the vessel under normal competitive conditions, and that such sale will aid in carrying out the policies of this Act, *the Commission shall sell such vessel to the applicant at the statutory sales price.*" [5]

By this provision the Commission was *directed* to sell "at the statutory sales price." Section 3 of the Act told the Commission how the "statutory sales price" should be computed and specified certain adjustments therein. One

[5] Emphasis added in this and later quotations unless otherwise indicated.

of these adjustments was a deduction for the cost of placing the vessels in class, and petitioner admits that strapping was a class requirement (Pet. 7). The only upward adjustment authorized was for "desirable features" (Section 3(d)(3)), and as pointed out (*supra*, p. 5), petitioner conceded in the court below that strapping did not fall in this category. There was no basis whatever in the pricing formula for the repair charges made against respondent Southeastern.

The legislative history of the Act, excerpts from which are contained in Appendix B hereto, confirms beyond any doubt (a) the mandatory character of the statutory pricing formula, (b) the intent of Congress that qualified shipping companies should have a *right* to purchase at the price fixed by Congress, (c) the required downward adjustment in price for the cost of class work, and (d) the intended distinction between class repairs and desirable features.

Two examples from the legislative history are representative. The Senate Committee Report stated the proposition as follows:

> ". . . Only Congress can lay down the necessary standards and directions for the orderly disposition of the war-built fleet, in order that there may be established and maintained a healthy and vigorous post-war American merchant marine in the interest of world-wide peaceful commerce, in the interest of national security, and in order that those having the direct responsibility of administration may be guided and controlled by standards acceptable to the Congress speaking in the public interest." (S. Rept. No. 807, 79th Cong., 1st Sess. (1945), p. 2.)

Similarly, the House Committee Report stated that any qualified applicant was "*entitled* to purchase a war-built vessel from the Commission at the statutory sales price," if the Commission determined that the sale would carry out the policies of the Act; and that the statutory sales price was "a fixed price." (H. Rep. No. 831, 79th Cong., 1st Sess. (1945), p. 8.)

This Court has on numerous occasions made clear that administrative agencies may not take action outside of the Congressional grant of authority; that where they do so, they are invading the field of the Legislature;[6] and that Congress alone can prescribe the terms for the disposition of Government property.[7] Under a statute of the type here involved the administrative agency could not alter the pricing formula of the Act.

In the face of the positive character of the pricing provisions of the Act, petitioner's arguments slip off in irrelevant directions. Petitioner first argues that the Act conferred no judicially enforceable rights upon respondents to buy upon the statutory terms (Pet. 15, 16), relying upon *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *United States* v. *New York P. R. S. S. Co.*, 239 U. S. 88, and *Goldberg* v. *Daniels*, 231 U. S. 218. But these cases are not remotely in point. The first two involved statutes enacted exclusively for the benefit of persons other than the litigants who sought to invoke them. The *Perkins* case held that a *prospective* bidder was without standing to enjoin a regulation of the Secretary of Labor relating to minimum wages to be paid by Government contractors. The *New York*

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[6] *Koshland* v. *Helvering*, 298 U.S. 441, 446, 447; *Manhattan G. E. Co.* v. *Commissioner of Int. Rev.*, 297 U.S. 129, 134, 135; *Miller* v. *United States*, 294 U.S. 435, 439, 440; *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599, 609, 610; *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315, 321, 322; *International Ry. Co.* v. *Davidson*, 257 U.S. 506; *United States* v. *Laughlin*, 249 U.S. 440, 443; *United States* v. *United Verde Copper Co.*, 196 U.S. 207; *Campbell and Thayer* v. *United States*, 107 U.S. 407; *Morrill* v. *Jones*, 106 U.S. 466.

[7] U.S. Const., Art. 4, § 3, cl. 2; *United States* v. *California*, 332 U.S. 19, 27; *Royal Indemnity Co.* v. *United States*, 313 U.S. 289, 294; *United States* v. *San Francisco*, 310 U.S. 16, 29, 30; *Light* v. *United States*, 220 U.S. 523, 537; *Butte City Water Co.* v. *Baker*, 196 U.S. 119, 126; *United States* v. *Nicoll*, 27 Fed. Cas. 149 (N.Y., 1826). In the *California* case, the Court said (p. 27): "Thus neither the courts nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power."

P. R. S. S. Co. case held that the Government could recover upon a contract not executed with the formalities required by statute, since the formalities were solely for its protection. The *Goldberg* case held that mandamus would not lie against a Government official to compel the delivery of property claimed by the low competitive bidder, whose bid had not been accepted, because the action was, in effect, against the United States which had not consented to be so sued.

In this case, the Act conferred specific rights upon respondents to buy on the statutory terms. Petitioner's argument contradicts the declared policy of the Act, which was to restore the American Merchant Marine, of which respondents are a part. In *United States* v. *Laughlin*, 249 U. S. 440, a case closely parallel to the present one, this Court, in upholding recovery in the Court of Claims of an amount paid for public land in excess of the minimum price set by statute, said (p. 447), ". . . a qualified pre-emptor was entitled to purchase at the minimum price. This was a substantial right, of which he could not be deprived by arbitrary action of the officers of the government." In *Work* v. *United States, etc.*, 262 U. S. 200, a lessee of Government lands was held to have a right to purchase such lands at the price fixed by statute. Cf. *Hunter* v. *Anderson*, 74 F. Supp. 721 (D. C. Tex., 1947).

Petitioner next argues, in substance, that since disposal legislation customarily confers broad discretion upon the selling agency, the same must be true of the Ship Sales Act (Pet. 17-19). But none of the cases cited by petitioner has any relevance to the type of legislation or situation here presented.[8]

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[8] *Goldberg* v. *Daniels*, 231 U.S. 218, and *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, held that specific relief (mandamus, in the former—an injunction, in the latter) could not be obtained against a Government officer with respect to property claimed under a Government contract, since the suit was, in effect, against the United States, which had not consented to be sued. In the *Larson* case, the Court clearly distinguished an injunctive proceeding from a suit for damages (p. 704), and in fact stated that the

In dealing directly with the Act, petitioner, although acknowledging the "seeming specificity" of the pricing provisions, argues that nonetheless broad discretion was lodged in the Maritime Commission (Pet. 18). But this case does not involve any of the instances of discretion vested in the Commission. Respondents are not questioning the selection of the "standard vessel" which was made in 1946, or the computation of the "statutory sales price" (apart from the prescribed adjustments) which petitioner says involves the "appraisal of many complex industrial factors." The qualifications of respondents as purchasers are not in issue, because the Commission had made this determination in their favor before the purchase contracts were signed. The Commission had also found that the sales to them would aid in carrying out the policies of the Act. And, as for the legal issue of what were "desirable features," within the meaning of Section 3(d)(3) of the Act, petitioner's concession in the court below that strapping was not a "desirable feature" (contrary to the Commission's earlier conclusion that strapping could be treated as a desirable feature) was a direct repudiation of the Commission's alleged "expertise" to which petitioner now refers (Pet. 19).

Finally, petitioner challenges the action of the court below, first, as an improper substitution of its construction of the Act for that of the parties (Pet. 17), and, second, as a usurpation of the administrative discretion of the Commission (Pet. 22, 23).

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plaintiff admittedly had a remedy in the Court of Claims (p. 703, n. 27). *United States ex rel Dunlap* v. *Black*, 128 U.S. 40, held only that mandamus would not lie to correct a Government officer's interpretation of a statute which authorized him to exercise discretion or judgment. In neither *Gilbert & Secor* v. *United States*, 8 Wall. 358, nor *Matson Navigation Co.* v. *United States*, 284 U.S. 352, were the contracts involved contrary to the terms of any statute. In the latter case, the company had the option to accept the charter terms or sue for "just compensation," and chose the former. Indeed, it was not objecting to the charter terms, the only issue being jurisdictional, i.e. as to whether a "maritime" cause of action was involved.

As for the first, the court obviously did not substitute its construction for that of the parties. On the contrary, respondents had protested the Commission's construction, and the court simply sustained their construction. Necessarily, where a claim is "founded upon" an Act of Congress, as here, the court must interpret the law.[9] That is the function of the court.

The second point is somewhat obscure. Petitioner seems to suggest that the contract clauses relating to the strapping and repair charges could be found invalid only under circumstances where the Commission would thereafter be afforded an opportunity to consider a second time whether it would sell to respondents or to others (without making these invalid charges), or withhold the vessels from sale; and that the decision of the court below is wrong because it has the effect of denying that opportunity to the Commission. The argument becomes complicated by the fact that Congress has withdrawn the power of sale under the Act.

Petitioner's suggestion, coupled with its reliance upon *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17 and *United States* v. *Jones*, 336 U. S. 641,[10] again manifests a complete misunderstanding of the area of the Commission's discretion, and, in particular, the mandatory character of the pricing provisions of the Act. By prescribing how the selling price should be computed, Con-

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[9] For example, in *United States* v. *Laughlin*, 249 U.S. 440, the Court construed a number of statutory provisions in determining the price at which the buyer was entitled to purchase public land.

[10] In *Idaho Power Co.*, Congress had expressly lodged broad discretion in the FPC in licensing hydroelectric projects to insure that they would fit in with a comprehensive plan for the development of water power. In the *Jones* case, Congress had plainly conferred the rate-making power upon the Interstate Commerce Commission and did not want the courts to make the rates. But the rates were held reviewable for basic errors of law. Moreover, in *Idaho Power Co.*, the Court recognized that where an unconstitutional provision in a license is separable, it may be excised by a court (344 U.S. at p. 20).

gress removed that element from the Commission's discretion. The discretion which Congress reposed in the Commission was to determine whether the applicant was qualified and whether the sale to him would aid in carrying out the policy of the Act (*i.e.*, the welfare of the American Merchant Marine). Once the Commission made those determinations in respondents' favor, its discretion was exhausted. In awarding judgment to respondents, the court below merely interpreted what Congress had set as the selling price, and in no way invaded the administrative realm.

Petitioner's arguments also overlook entirely the strong public policy considerations in legislation of this type. If the Maritime Commission could have ignored the pricing formula in the Act and increased prices as it saw fit, the practical effect would have been to exclude from the group of otherwise qualified buyers, all who refused to consent to arbitrary agency action. Such a result would not only have been contrary to the express mandate of Congress, but might have placed the merchant fleet in the hands of the less qualified buyers, or in the hands of noncitizens, over whom citizen buyers were to have preference under the Act (see Section 6 of the Act).

An analogy is suggested by the cases dealing with appointment to public office, which uniformly hold that Government agencies cannot by *contract or otherwise* reduce the salary of an office fixed by statute and that an appointee, who by contract has agreed to accept less, may nevertheless recover the statutory salary.[11] In these cases, the Court has held that such arrangements might exclude from service those more qualified persons who would be willing to take office at the statutory salary but would not come for less.

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[11] *United States* v. *Andrews*, 240 U.S. 90; *Glavey* v. *United States*, 182 U.S. 595.

2. Waiver and Estoppel.

Petitioner's first point is that even assuming the Maritime Commission acted contrary to the express terms of the statute in requiring respondents to pay the strapping and repair charges, respondents nevertheless waived their statutory rights by executing the contracts and accepting the vessels (Pet. 20, 21). Petitioner's second point is that respondents are "equitably estopped" from contesting the invalid contract provisions, because by signing the contracts, respondents "may have" induced the Commission not to redefine the standard T-2 tanker, an alternative course of action which, it is claimed, would have been legal under the Act (Pet. 22).

The cases cited by petitioner in support of its first point are wholly irrelevant.[12] As has been shown, Congress intended that the vessels should be sold at the statutory

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[12] In *Matson Navigation Co.* v. *United States*, 284 U.S. 352, *American Smelting & Refining Co.* v. *United States*, 259 U.S. 75, *Gray* v. *Commodity Credit Corporation*, 159 F. 2d 243 (C.A. 9), and *Parish* v. *United States*, 8 Wall. 489, the contracts were not in conflict with the provisions of any statute. *United States* v. *San Francisco*, 310 U.S. 16, and *Fahey* v. *Mallonee*, 332 U.S. 245, are largely applications of the rule that this Court will not pass on the constitutionality of a statute at the instance of one who has availed himself of its benefits—a rule described by Mr. Justice Brandeis as one developed by this Court "for its own governance" to avoid unnecessarily passing upon constitutional questions. See *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-48. *Callanan Road Co.* v. *United States*, 345 U.S. 507, is merely an application of the doctrine that a party will not be permitted to assume contradictory positions with respect to the same matter in the same or successive proceedings. *Gibson* v. *Lyon*, 115 U.S. 439, is only an application of the doctrine of estoppel by deed as enforced in Pennsylvania (Cf. *In re Solomon*, 40 F. Supp. 62, 63 (E.D. Pa.)—a doctrine wholly irrelevant to any of the issues of this case. *Shutte* v. *Thompson*, 15 Wall. 151, simply holds that one will not be heard to raise a remediable procedural objection if he has knowingly waited until it is too late to cure the objection. Moreover, the contract provisions in this case, held by the court below to be contrary to the statute, are entirely separable from, and their invalidity cannot affect, the remainder of the contracts. *Merchants Cotton Press & Storage Co.* v. *Insurance Co. of North America*, 151 U.S. 368, 388; *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64; *Williston on Contracts* (Rev. Ed.) §§ 1779, 1780, 1782.

price; the challenged provisions were in clear violation of the statutory price; and respondents were entitled to purchase upon the statutory terms. Respondents are not attacking the validity of the statute, but are seeking only the intended benefits of the statute as prescribed by Congress, no more and no less. Respondents are only attacking a condition sought to be imposed by agency action which conflicts with a condition set down by the Legislature. The only practical solution at the time of purchase was for the buyers to sign the contracts under protest, reserving their rights for later judicial determination. The basic purpose of the Ship Sales Act would have been defeated if the only alternative available to qualified buyers was to refuse to purchase the vessels because of the invalid terms.

Respondents' protests to the invalid contract provisions, as well as the protests by the industry in general (R. 211-12), were not meaningless gestures, as suggested by petitioner (Pet. 21, n. 14, n. 15). On the contrary, these protests served to make clear that there was no waiver.[13]

Moreover, courts will not invoke waiver or estoppel to permit enforcement of contract provisions which are contrary to statute, particularly, where, as here (*supra*, p. 14), strong considerations of policy are involved.[14] For exam-

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[13] *Southern Pacific* v. *United States*, 268 U.S. 263, 269; *Swift & C. & B. Co.* v. *United States*, 111 U.S. 22. None of the cases cited by petitioner involved a contract contrary to any statute. The *Edmonston* case was an action to recover an overpayment for public land. The Court, in holding that the payment was *voluntary* and under a mutual mistake of law, which was not known by either party until after the sale, pointed out the absence of any objection or protest (pp. 501, 514, 515). And, in *American Smelting & Refining Co.*, the Court stated (p. 78) that if the plaintiff "had desired to stand upon its legal rights, it should have saved the question of the price. It did not do so, but, on the contrary, so far as appears, was willing to contract, and was content in the main with what was offered."

[14] *Snyder* v. *Buck*, 340 U.S. 15, 19; *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706; *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356; *Awotin* v. *Atlas Exchange Bank*, 295 U.S. 209, 213; *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U.S. 245; *Pittsburgh, etc. Ry. Co.* v. *Fink*, 250 U.S. 577.

ple, this Court in *Glavey* v. *United States,* 182 U. S. 595, 609, quoted with approval the following from *Miller* v. *United States,* 103 Fed. 413, 416:

> " . . . And, if public policy prohibit such a bargain [an agreement by a public official to accept less than the statutory salary] in advance, it would seem that a court should be astute not to give effect to such illegal contract by indirection, as by spelling out a waiver or estoppel."

Petitioner's second point, that respondents are "equitably estopped" because the Commission "may have" been induced by respondents not to take an alternative course of action (retyping the T-2), which would have been unassailable under the Act, is equally unavailing. In the first place, respondents did not mislead the Maritime Commission. On the contrary, they objected to the inclusion of the illegal contract provisions. Moreover, the record shows plainly that when the strapping question was initially presented to the Commission, it took the position that a "desirable feature" charge could legally be made under the Act (R. 242-43). There is not the slightest indication in the record that the Commission was ever of the opinion that it would have had a right to retype the T-2 vessels. Secondly, and of greater significance, the alternative course of action which petitioner says the Maritime Commission was induced not to take would also have been contrary to the Act and therefore illegal (*supra,* p. 6).

Clearly, estoppel should not be applied here to permit the subversion of the plain terms of the Act and to subject respondents to a detriment. As this Court stated in *Dickerson* v. *Colgrove,* 100 U. S. 578, 580, the doctrine of equitable estoppel is applied so as "to promote the ends of justice." And, as Judge Hand observed in *Helvering* v. *Schine Chain Theatres,* 121 F. 2d 948, 950 (C. A. 2):

> ". . . there was no basis for an 'estoppel,' however broadly one uses that disastrous word. This is true because, however nebulous, it has always had at least

this solid centre; that the party who invokes it shall have acted to his detriment in reliance upon what the other party has done."

3. Jurisdiction.

Petitioner argues that the court below by accepting jurisdiction "has *sub silentio* in this case" abandoned the rule laid down by this Court in *United States* v. *Holland-America Lijn*, 254 U. S. 148 (Pet. 24). It also says that respondents' case has common issues with the case of *Clapp* v. *United States* (No. 248), in which petitioner has concurrently filed a petition for a writ of certiorari.

The injection of the jurisdiction issue in this case was an afterthought. It was not mentioned below in the answer, in petitioner's original brief, in oral argument, or in petitioner's supplemental brief filed after argument. The point was first suggested on motion for rehearing, but even there petitioner placed no stress on the *Holland-America* case, and made no effort to indicate its relevance. The principal point made on motion for rehearing was that respondents' claims were not "founded upon" an Act of Congress because the Ship Sales Act did not provide expressly for a refund of the strapping charge (R. 354-55, 361).[15]

Petitioner incorporates by reference the jurisdictional arguments it makes in the *Clapp* petition (Pet. 24). There it argues that *Holland-America* involved "a claim for dam-

[15] This point is not raised in the petition. The notion has been thoroughly dispelled that the statute upon which suit is brought must contain an *express* provision for refund or payment. See *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 30-32; *Dooley* v. *United States*, 182 U.S. 222; *Aycock-Lindsey Corp.* v. *United States*, 171 F. 2d 518, 520-1 (C.A. 5); *Compagnie General Transatlantique* v. *United States*, 21 F. 2d 465, 466 (S.D. N.Y.), aff'd. 26 F. 2d 195 (C.A. 2); cf. *Bell* v. *Hood*, 327 U.S. 678. *Baltimore Mail SS Co.* v. *United States*, 76 F. 2d 582 (C.A. 4), cert. den. 296 U.S. 595, cited by petitioner, has been construed as holding that courts have no jurisdiction under the Tucker Act over claims implied *in law*, cf. *Ross Packing Co.* v. *United States*, 42 F. Supp. 932, 936 (E.D. Wash).

ages sounding in tort" and is "on all fours" with the *Clapp* case (Clapp Pet. 17). No such contention is or can be made in the present case. The cases are wholly unalike. In *Holland-America*, certain charges were exacted from plaintiff for maintenance and medical care of aliens, under threat of detention of its vessels. The Court regarded the claim as one for damages for "the wrongful and *tortious* acts of officials of the United States government, acting without authority of law in *coercing* the claimant to pay the sums demanded" (254 U. S. at 153). Thus, the cause of action there was considered to have been founded in tort, and not to have been related to a claim "founded upon" an Act of Congress.

Petitioner further argues in the *Clapp* petition that the claim there was not "founded upon" an Act of Congress because the statute became an issue only as a matter of defense by the Government (Clapp Pet. 19, 20). Here, the rights which respondents seek to enforce are spelled out affirmatively in the Act and their claims are based squarely upon the Act. Jurisdiction of the Court of Claims over these claims is conferred by the second subdivision of 28 U.S.C. 1491.

A long line of Supreme Court and lower Federal Court decisions has firmly imbedded the principle that one may recover a money judgment against the United States where his rights derive from an Act of Congress.[16]

4. Scope of the Decision Below.

The decision below has no importance either to government disposal or acquisition contracts in general, or to problems arising under the Ship Sales Act.

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[16] *Dismuke* v. *United States*, 297 U.S. 167; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 30-32; *United States* v. *Hvoslef*, 237 U.S. 1, 7-10; *Dooley* v. *United States*, 182 U.S. 222, 223-28; *United States* v. *McDonald*, 128 U.S. 471; *Beers* v. *FSA*, 172 F. 2d 34 (C.A. 2); *Christie-Street Commission Co.* v. *United States*, 136 F. 2d 326, 327-31 (C.A. 8); *Compagnie General Transatlantique* v. *United States*, (S.D. N.Y.) 21 F. 2d 465, 466 aff'd. 24 F. 2d 195 (C.A. 2).

The Ship Sales Act was legislation of a unique character, designed to accomplish the disposal of the Government's surplus merchant vessels of 1500 gross tons or over after World War II. The authority to sell expired on January 15, 1951 (Pet. 4, n. 2).

The decision below relates only to Sections 3 and 4 of the Act, which the court found to embrace a mandatory pricing formula and to confer rights upon respondents to buy upon terms according with that formula. The decision has no bearing on other types of disposal legislation not of the same mandatory and beneficial character. Petitioner has pointed to no other legislation, even remotely similar, in the field of government acquisition or disposition of property which might be affected by the decision below. The concern expressed by petitioner that the decision may "by implication" affect "the entire field of Government procurement and the disposal of Government property" (Pet. 14) is completely without justification, and yet is advanced as a principal reason for review of the case by this Court.

The issues decided by the court below are limited to only one type of vessel sold under the Act, only to vessels of that type sold to United States citizens, and only to a part of those sold to United States citizens. There is only a single type of "class" requirement involved—namely, strapping. Significantly, *it is the only type of class requirement in the entire ship sales program for which a desirable feature charge was asserted against purchasers* (R. 85-87, 245-46). The cost of all other types of class requirements was absorbed in full as a matter of course on vessels sold to citizens (R. 87, 261). Similarly, the repair charges made against respondent Southeastern were limited to tankers; and only to those sold after October 2, 1947, an arbitrary date (R. 94-98).

The relevance of the issues here to potential charter claims, which petitioner mentions, is not established—being wholly conjectural. This case involves the sales provisions of the Act (Sections 3 and 4), while any charter claims

would arise under the chartering provisions of the Act (Section 5), and certain sections of the Merchant Marine Act, 1936. The position of the Maritime Administration is that the charter terms involved are in accordance with Section 5. There is time enough to present issues concerning those terms to this Court when and if Section 5 is construed by the courts in a fashion which the Government considers erroneous. It is premature, in view of the many speculative considerations, to bring that section into this case as a reason for review.

Similarly, such issues as estoppel, waiver, discretion of administrative agencies, and the general authority of Government disposal or procurement agencies to contract on terms favorable to the Government, which petitioner raised both in the court below and here, have relevance only in connection with legislation lodging discretion in the administrative agency to set the terms upon which the Government will do business. In the light of the Act, as construed by the court below, these issues are not germane, and remain unaffected by its decision.

CONCLUSION.

Accordingly, this case has no relevance to government contracts generally. It involves only a narrow issue arising under a special type of disposal statute which has expired.

It is respectfully submitted, therefore, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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September 10, 1954.

APPENDIX A

Declaration of Policy

Sec. 2. (a) It is necessary for the national security and development and maintenance of the domestic and the export and import foreign commerce of the United States that the United States have an efficient and adequate American-owned merchant marine (1) sufficient to carry its domestic water-borne commerce and a substantial portion of its water-borne export and import foreign commerce and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times; (2) capable of serving as a naval and military auxiliary in time of war or national emergency; (3) owned and operated under the United States flag by citizens of the United States; (4) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel; and (5) supplemented by efficient American-owned facilities for shipbuilding and ship repair, marine insurance, and other auxiliary services.

(b) It is hereby declared to be the policy of this Act to foster the development and encourage the maintenance of such a merchant marine.

APPENDIX B

"Any vessel of the T-2 type that is strengthened, or for the cost of strengthening which the Buyer has received an allowance as above indicated, shall be considered as having an additional desirable feature within the meaning of Clause (3) of Section 3(d) of the Act, and the Buyer shall pay for such additional desirable feature an amount determined by the Commission in accordance with subparagraph (5) of Section 299.1(f) of the Regulations. In the event the Commission has not determined said amount up to the time of delivery of the vessel, the Buyer shall deposit with the Commission the sum of $28,875 for each vessel to cover the payment for such additional desirable features, it being understood that when the Commission determines the amount chargeable to the Buyer, the above deposit will be adjusted upward or downward and payment will be made by the Buyer or by the Commission of the difference between the deposit and the cost of such additional desirable features."

APPENDIX C

Legislative History Showing (1) Mandatory Character of the Pricing Provisions of the Act; (2) The Rights of Qualified Applicants to Purchase; (3) The Requirement That the Cost of "Class" Work Be Absorbed by the Government; (4) The Distinction Between Class Repairs and Desirable Features.

Also Relevant Quotations From Previous Decisions of the Court Below Under the Ship Sales Act.

1. Mandatory Character of the Pricing Provisions of the Act.

"Mr. Speaker, the general purpose of the bill is obvious. *It is designed to establish in advance of sales certain statutory prices* for which merchant vessels constructed for or by the United States during the war period may be sold. Of course, a necessary correlative to the establishment of fixed prices for the various classes of vessels is to *limit quite completely the scope of discretion to be exercised* by the Maritime Commission in connection with these sales." (Statement of Representative Bonner, 92 Cong. Rec. 1642 (1946))

. . . "We fix a formula, we fix a standard, and that is subject in the case of each ship to definite modifications . . ." (Statement of Senator Radcliffe, 91 Cong. Rec. 11865 (1945))

"The House of Representatives gave this subject very careful study. The members of the Senate Committee on Commerce, which has devoted much time to the subject, realizing that we control the entire market came to the conclusion that instead of leaving the authority to sell in the hands of an administrative officer of the Government, with unlimited discretion, it would be better for the Government and better for the industry to attempt to fix a price and to provide that if the ships cannot be sold at that price they will be taken off the market." (Statement of Senator Radcliffe, 91 Cong. Rec. 11862-3 (1945)).

". . . In other words, if the Maritime Commission were allowed to sell ships in whatever way it saw fit, results might follow which would appall us. The Maritime Com-

mission does not want such blanket authority. It has been decided to lay down a formula by which the ships may be disposed of. . . ." (Statement of Senator Radcliffe, 91 Cong. Rec. 11883 (1945)).

"Then, in my view, this bill undertakes so to circumscribe the authority, so to limit the activities, and so to subordinate the judgment of the Maritime Commission with respect to what ships should be sold and the prices at which they should be sold that the purpose of the bill is defeated."

* * * * *

"But in the pending bill, by removing from the Maritime Commission the obligation to exercise discretion and responsibility, we are undertaking to substitute for its discretion and responsibility a statement of the terms and conditions under which such sales may be made and we are undertaking to establish the rigidity of law in place of the exercise of sound discretion by a regulatory body." (Statements of Senator White, in opposition to the bill. 91 Cong. Rec. 11863 (1945))

Expressions of the Maritime Commission subsequent to the passage of the Act, re-affirm this legislative history.

For example, the Vice-Chairman of the Commission stated before the Subcommittee on Maritime Affairs of the Merchant Marine and Fisheries Committee in connection with H. R. 2336 (81st Congress, 1st Session), as follows (page 22):

"The Ship Sales Act provided a formula by which the Commission in administering the sales under that act, *the prices were mandatory as to what they would be and how they would be arrived at.*"

"The Ship Sales Act fixes the prices at which 'war-built merchant vessels'—roughly defined as those built after September 3, 1939—may be sold." (Report of the U. S. Maritime Commission for the period ended June 30, 1946, p. 6)

2. The Rights of Qualified Applicants to Purchase.

"Under section 4 of the bill, the Commission *is directed to sell a war-built vessel at the statutory sales price to a citizen applicant who is found by the Commission to have the ability, financial resources,* and other qualifications to enable him to maintain and operate the vessel under normal competitive conditions, provided that the Commission also determines that the sale of the vessel will carry out the declared policy of the act." (S. Rept. No. 807, 79th Cong., 1st Sess. (1945), p. 13)

In hearings which took place before the Government Operations Subcommittee of the House Committee on Expenditures in the Executive Departments on March 6, 1950, (81st. Cong. 2nd Sess.) the representative of the Maritime Commission who was charged with the responsibility of handling the ship sales program stated as follows (page 271):

"Under the law they [the buyers] *were entitled to buy the vessel at a price based on a certain formula, and the Commission had no right varying from that formula under the law.*"

"The act grants a large degree of opportunity and protection to the qualified American operator—subsidized or unsubsidized—who wants to purchase or charter ships." (Report of the United States Maritime Commission for the period ended June 30, 1946, p. 6)

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3. The Requirement That the Cost of Class Work be Absorbed by the Government.

" . . . The bill, however, makes express provision for placing all vessels to be disposed of in *normal operating condition for commercial use in peacetime at the expense of the United States. It further provides that the standard vessel for which the statutory selling price is fixed must be in class.*

* * * * *

" . . . it is to be borne in mind that vessels for sale under the bill *are placed 'in class' and are reconverted or re-*

stored for normal operation in commercial services at the expense of the Government." (S. Rept. No. 807, 79th Cong., 1st Sess. (1945) pp. 4 and 12)

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4. The Distinction Between Class Repairs and Desirable Features.

"There is a statutory price for these ships. Let us say there are three or four ships before a prospective buyer for consideration. One is in class and one is not in class. It is certainly not unreasonable to say that there may be different prices placed on them, or, in other words, if a certain ship is not in class, a sufficient amount should be allowed, or expended, to bring it up to class, whatever that may be. *A vessel may have features that are above class.*" (Statement of Senator Radcliffe, 91 Cong. Rec. 11874 (1945))

Relevant Quotations From Previous Decisions of the Court Below Under the Ship Sales Act.

The court below reviewed the legislative history in two prior cases. In the case of *A. H. Bull Steamship Co.* v. *United States,* 123 C. Cls. 520, 108 F. Supp, 95, 97-98 (1952), it summarized that history as follows:

"The Merchant Ship Sales Act of 1946 was intended to fix, by a self-operating statutory formula, the selling price of the Government's surplus ships. Except for the matter of the existence and value of desirable features, which would in any event be a small factor in the price, the determination of the price was a mere mathematical calculation, once the then Maritime Commission had determined, for the type of vessel in question, the prewar domestic cost and the war domestic cost of such vessels . . . "

In the case involving the fireproofing of Liberty tankers, *Southeastern Oil Delaware, Inc., et al.* v. *The United States,* 124 C. Cls. 561, 109 F. Supp. 395, 396, 399 (1953); the court stated:

"In our recent decision in *A. H. Bull Steamship Co.* v. *United States,* Ct. Cl., 108 F. Supp. 95, we discussed the

objectives of the Merchant Ship Sales Act and such of its details as were there pertinent. Congress desired to get the Government's war-built merchant fleet into the hands of private owners and operators on terms fair to the Government and to the purchasers. It provided for formulas for determining the prices at which various types of vessels should be sold, the application of which formulas would, largely automatically, set uniform prices for the vessels. It desired that the vessels as sold should be operable. To be operable they had to be, according to the trade expression, 'in class', that is, in condition to pass the inspection of the regulatory agencies of the Government whose certification of approval was necessary for lawful operation."

" . . . When we consider further the objectives of the Merchant Ship Sales Act of 1946, one of which was to sell Government ships to private purchasers in operable condition, we think that that objective would have been defeated by selling a ship which, as the Maritime Commission should have known, might not be permitted to operate at all."